

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 230X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN LASSEN
COUNTY, CA, AND WASHOE COUNTY, NV

Decided: August 5, 2008

By decision served on January 26, 2007 (January decision), the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by Union Pacific Railroad Company (UP) of a 21.77-mile rail line in Washoe County, NV, and Lassen County, CA, and a .57-mile rail line in Lassen County (collectively, Line).¹ The exemption was scheduled to become effective on February 25, 2007, but Nevada Central Railroad (NCR) and RTI Railroad Services (RTI) (together, potential offerors) filed timely notices of intent to file an offer of financial assistance (OFA) to purchase the Line.² Both parties requested that UP provide the financial data and information prescribed in 49 CFR 1152.27(a) (prescribed information), including: the most recent report on the physical condition of the Line, UP's estimate of the net liquidation value (NLV) of the Line, data supporting the NLV, and the minimum purchase price of the Line.

By decision served on February 2, 2007 (February decision), the Board tolled the time period for NCR and RTI to file an OFA until 10 days after UP provided potential offerors with the prescribed information. The Board also indicated that RTI had asked UP to provide certain other information as well (additional information). See id. at n.1. In a filing dated March 27, 2008 (March 27 filing), UP asserts that it provided NLV information for the Line to RTI on January 17, 2007, and to NCR on April 16, 2007,³ and requests that the Board: (1) acknowledge

¹ The January decision made the exemption subject to employee protective conditions, as well as various environmental and historic preservation conditions, all of which remain in effect.

² Tulare Valley Railroad Company (TVRR) of Salt Lake City, UT, also had filed a notice of its intent to file an OFA for the 21.77-mile rail line in Washoe County and asked UP for information needed to file an OFA, but has not filed an OFA or sought a tolling of the OFA deadline.

³ In its petition for exemption in this proceeding, UP originally stated that its plan was to reclassify the Line after abandonment and sell it for operation as an industrial lead to a railroad

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that UP has provided potential offerors, as well as TVRR, with the prescribed information; and (2) remove the tolling of the time period for filing of an OFA in this proceeding. NCR filed various motions and a reply, opposing UP's requests.

In response to a telephone call from NCR, UP, in a letter dated April 4, 2008 (April 4 letter), a copy of which was provided to the Board, informed NCR that it believed that it had provided NCR with the prescribed information. UP added that NCR was entitled to access to the records, accounts, appraisals, working papers, and other documents used in establishing the NLV for the Line and that such documentation would be made available to NCR during regular business hours at a time and place mutually agreeable to both UP and NCR. UP also indicated that the NLV for the track structure had increased since it provided NCR with the NLV for the Line and that UP would supply NCR with an updated value and a supporting worksheet.

On April 9, 2008, NCR filed a motion requesting that the Board continue to extend the tolling period for NCR and a motion to compel UP to provide the prescribed information, alleging that NCR had not yet received the prescribed information. On April 11, 2008, UP filed a reply (April 11 reply) to NCR's motions, in which UP submitted: (1) a copy of a letter and NLV estimate dated April 16, 2007, and, according to UP, provided to NCR on that date; and (2) an updated NLV provided to NCR along with a letter dated April 10, 2008.

On April 17, 2008, NCR filed a reply to UP's April 11 reply, contending that it has yet to obtain the most current report of physical condition on the Line or supporting information, pursuant to 49 CFR 1152.27(a). NCR indicates that it now desires the additional information sought by RTI. NCR also alleges that UP already has commenced salvage of the Line. Further, on April 29, 2008, NCR filed a motion to strike (April 29 motion) UP's April 11 reply, arguing that it was misleading and inadmissible. On May 5, 2008, UP replied (May 5 reply) to NCR's April 29 motion, attaching copies of United Parcel Service shipping documents corresponding to UP's service of the NLV information on NCR as evidence that NCR had received the information both in 2007 and 2008. On May 13, 2008, NCR filed a motion to strike (May 13 motion) UP's May 5 reply as an impermissible reply to a reply and as unresponsive.

PRELIMINARY MATTERS

NCR has filed two motions to strike. In its April 29 motion, NCR seeks to strike UP's April 11 reply, including copies of the NLV information provided to NCR on April 16, 2007, and the updated NLV information provided to NCR in a letter dated April 10, 2008. Under 49 CFR 1152.27(a), UP is obligated to file such information with the Board, and UP has done so in its April 11 reply. Therefore, NCR's April 29 motion will be denied.

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tie disposal contractor. In its March 27 filing, UP indicated that this contractor was RTI, explaining that it had protracted negotiations with RTI over the sale of the Line, but that the parties failed to reach an agreement.

In its May 13 motion, NCR seeks to strike UP's May 5 reply, in which UP provides evidence that the NLV information and updated NLV information were served on NCR properly. NCR argues that UP's reply is an impermissible reply to a reply and unresponsive. However, UP's May 5 reply is responsive to NCR's allegation that NCR has not yet received the prescribed information, and it also clarifies the record. Moreover, NCR does not explain logically how NCR would be harmed by acceptance into the record of UP's May 5 reply. Therefore, NCR's May 13 motion will be denied.

DISCUSSION

UP appears not to have provided NCR with the most recent report on the physical condition of the Line. This report is required by 49 CFR 1152.27(a)(2). It also is relevant to NCR's allegations that there may have been salvage activities on the Line. Because UP did not provide potential offerors with all of the prescribed information, the self-executing condition in the February decision that would have restarted the time period to file an OFA was not met. Thus, UP will be directed to provide NCR with its most recent report on the physical condition of the Line, as well as the documents that UP used to establish its NLV for the Line, and to certify to the Board that it has done so within 10 days from the service date of this decision (by August 15, 2008).

NCR also indicates a desire to obtain the additional information previously requested by RTI. However, under 49 CFR 1152.27(a), UP is not required to provide the additional information requested by RTI. For example, RTI had sought an estimate of rehabilitating the Line to a Federal Railroad Administration Class 1 track standard, but this information is required only if an offer of subsidy is contemplated, and NCR has not indicated that it is contemplating an offer of subsidy.

After review of the information that UP has provided to NCR (including the updated NLV information), it appears that, once NCR receives from UP its most recent report on the physical condition of the Line and the documents that UP used to establish its NLV for the Line, NCR would have sufficient information to submit an OFA. Thus, once UP provides NCR with that information and certifies to the Board that it has done so, the tolling of the OFA time period will be lifted, and the time period for the filing of an OFA will expire 10 days thereafter. Although it appears that RTI is no longer interested in pursuing an OFA with UP, RTI may, should it wish to do so, file an OFA within the same time period as NCR.⁴ At UP's request, the effective date of the exemption will be extended until 10 days after expiration of the OFA due date.

⁴ RTI has not informed the Board of any further information it would need to prepare an OFA.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NCR's motion to continue to extend the tolling period is granted, to the extent discussed above.
2. NCR's motion to compel is granted, to the extent discussed above.
3. NCR's motion to strike UP's April 11 reply is denied.
4. NCR's motion to strike UP's May 5 reply is denied.
5. UP is directed to provide NCR with UP's most recent report on the physical condition of the Line, as well as the documents that UP used to establish its NLV for the Line, and to certify to the Board that it has done so by August 15, 2008.
6. The due date for NCR and RTI to file an OFA shall be the date 10 days after UP files the certification described in paragraph 5.
7. The effective date of the exemption is postponed until 10 days after the expiration of the OFA due date.
8. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary